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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 401

PVT. E2 DENNIS MORA,
PFC. E2 JAMES A. JOHNSON,
and
PVT. E2 DAVID A. SAMAS,
Petitioners,

v.

ROBERT S. McNAMARA,
as Secretary of Defense,
and
STANLEY RESOR,
as Secretary of the Army of
the United States,
Respondents.

PETITION FOR REHEARING

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Dated: November 27th, 1967

Washington, D. C. - THIEL PRESS - 202 - 393-0625

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ROBERT S. McNAMARA,
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Respondents.

PETITION FOR REHEARING

Petitioners pray that this Court grant rehearing of its order of November 6, 1967, denying the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above case on February 20, 1967, affirming the order of the District Court dismissing the action for injunctive relief and a declaratory judgment, and that the petition for certiorari be granted.

Reasons for Granting Rehearing and Issuing the Writ

Substantial grounds available to the petitioners and not previously presented exist in this case under Rule 58 in that (1) the original petition for certiorari when prepared was done without the benefit of congressional interpretation and intent by Congress of the meaning of the Tonkin Bay Resolution, Public Law 88-408, 78 Stat. 384, 88th Cong. 2d Session; (2) the misleading statements appearing in the Government's memorandum in opposition call for a response, here made for the first time.

Two members of this Court, Mr. Justice William O. Douglas and Mr. Justice Potter Stewart, were of the opinion that the petition for certiorari should have been granted. They reasoned in substance that the issues herein should be heard by this Court and a determination made on their justiciability.[1]

Issues

This case presents issues never determined by this Court:

(a) Whether United States military activity in Vietnam constitutes a "war" without a declaration by Congress;

(b) Whether United States military activity in Vietnam is in violation of treaty obligations;

(c) Whether Public Law 88-408, 78 Stat. 384 (Tonkin Bay Joint Resolution) 88th Congress, 2d Session is an impermissible delegation of the war powers of Congress.

(d) Whether the United States is violating treaty obligations in its war action in Vietnam.

The hostilities that prevail in Vietnam have never been referred to as anything but a "war". The extent to which the President has involved the American people in military commitments and casualties, foreign and domestic policies, have raised questions of serious constitutional stature that should concern this Court.

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[1] Appendix A, hereto.

The military commitments are many and only a few of the most obvious ones are set forth in the petition to this Court for a writ of certiorari.[2] That petition can now be amended to show additional military casualties with these figures as of November 4, 1967: killed 14,453; non-combatant deaths 2,100; wounded 90,320; missing 798.

Domestically, strong and effective measures are being adopted to curtail and deprive citizens of constitutionally protected rights of free speech. Prosecutions under hastily drawn legislation for burning draft cards[3]; and non-possession of draft cards are now before this Court for consideration.[4]

As recently as October 26, 1967, the National Director of Selective Service, Lieut. Gen. Lewis B. Hershey, issued a memorandum that would make service in the military a form of punishment for war protesters.[5] In his letter to all Selective Service Boards he urged denial of deferment from the military to those who "violate the military selective service act or the regulations." He further added that "All elements of the Selective Service System are urged to expedite responsive classification and the processing of delinquents to the greater possible extent consistent with

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[2] Filed with this Court on July 20, 1967, No. 401.

[3] Section 12(b)(3) of Universal Military Training and Service Act, 50 U.S.C. App. § 462(b)(3), August 30, 1965.

[4] Miller v. U.S., 367 F.2d 72 (2d Cir. 1966) pet. for certiorari denied, 386 U.S. 911, pet. for rehearing pending. O'Brien v. U.S., 376 F.2d 538 (1st Cir. 1967) pet. for certiorari granted, Oct. 9, 1967, Nos. 232, 233.

[5] The New York Times, November 9, 1967. Cf President James Madison's Statement when upon his retirement he was honored by the citizens of Washington for his protection of civil liberties during the War of 1812, "Power and national glory, sir, have often been acquired by the sword; but rarely without the sacrifice of civil and political liberty."

sound procedure." This letter was accompanied by a memorandum of the same import. This letter and memorandum are the obvious result of a growing sentiment against an unpopular war because of its illegality and immorality. An earlier act to reclassify registrants for exercising first amendment rights of free speech was held unconstitutional in Wolff & Shortt v. Selective Service Local Board No. 16, et al., 372 F.2d 817.

I.

"War, in the broad sense, is a properly conducted contest of armed public forces, or in a narrower sense, a state of affairs during the continuance of which the parties to the war may legally exercise force against each other. It is not necessary, to constitute war, that both parties shall be acknowledged as independent nations or sovereign states, but war may exist where one of the belligerents claims sovereign rights as against the other." (67 C.J. 336).

Von Clausewitz, *On War* (Jolks trans. 1943, p. 4) terms "hostile contention" as "conflict". In our century it has been extended to instances in which there was an absence of actual hostilities, i.e. absence of resistance.[6]

Justice John C. Young, in *United States v. Von Leeb*, 11 *Trials of War Criminals Before the Nuremberg Military Tribunals* 485 (1950), defined war as "an implementation of a political policy by means of violence."

" 'Police actions,' 'armed reprisals,' 'limited war,' and 'total war' are nonetheless war. They are merely different as-

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[6] During the war crimes trials following World War II, various German leaders were found guilty of waging aggressive war against Denmark, Luxembourg and Czechoslovakia despite the absence of any resistance by those countries. 1 *Trial of the Major War Criminals Before the International Tribunal at Nuremberg*, 194-98, 204-88 (1947).

pects of a familiar technique in interstate relations which has never ceased to change since states first started using it."[7]

The actions of the United States in Vietnam constitute a war within the concept defined by Sir Arnold McNair:[8] They were, first, a declaration of war by one party; and second, if no declaration, then war would exist if the nation against whom force is applied treats such act of force as an act of war. This definition was quoted with approval by Joyce Gutteridge in 1949 when reporting on the scope of the Geneva Conventions of 1949. However, she was quick to add a realistic modification stating that the Geneva Conventions would also apply to "undeclared wars".[9]

2.

A full and detailed discussion of some of the treaties the United States has entered into renouncing war are set forth in the petition herein for a writ of certiorari. To name them only without repeating their applicable provisions, they are:

Kellogg-Briand Pact (pet. 7, 13, 29)[10]
Charter of United Nations (pet. 13, 29)
London Pact (Nuremberg) (pet. 7, 13, 29, 33)
Geneva Agreement of 1954 and our declaration (pet. 7, 13, 34, 35)
Southeast Asia Collective Defense Treaty (SEATO) (pet. 7, 14, 35)

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[7] *International Law*, Vol. II, Department of the Army Pamphlet 27-161-2, October 1962, page 5.

[8] *The Legal Meaning of War and Relations of War to Reprisals*, 11 Transact. Grot. Soc'y. 29 at 45 (1927).

[9] *Geneva Conventions of 1949*, 26 Brit. Yb. Int'l. L. 294, 298 (1949).

[10] References marked "pet." are to the petition herein for a writ of certiorari.

The law of land warfare is applicable and treaties become operative even in cases where there has been no formal declaration of war.[11]

3.

The President has indicated that authority for his actions in Vietnam may be inferred or extracted from the Tonkin Bay Joint Resolution of August 6-7, 1964 (H.J. Res. 1145; Public Law 88-408, 78 Stat. 384, 88th Cong., 2d Sess.). This resolution is of dubious constitutionality.[12] It is at least arguable that it represents an effort by Congress to delegate to the President power to declare war, a power which Article 1, Section 8, Clause 11, of the Constitution entrusts solely to Congress.[13]

The Tonkin Bay Resolution is, while broad in language, at most an ultimatum – if that. It

> approves and supports the determination of the President, as Commander-in-Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.

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[11] *The Law of Land Warfare*, Department of Army Field Manual, FM 27-10, July 1956, page 8.

[12] Question raised by Mr. Justice Potter Stewart in opinion to grant certiorari in this case, November 6, 1967.

[13] See the remarks of Senator Gruening, Congressional Record, May 8, 1965, pp. 9392 ff.; of Senator Morse, Congressional Record, April 30, 1965, pp. 8797, 8800 ff.; May 20, 1965, p. 10735. It is true, as Senator Morse has stated (Congressional Record, April 30, 1965, p. 8802) that ". . . we have been confronted with a type of legal anomaly such that if Congress and the President really usurp the power to act outside the law in this interesting field of law, we know of no procedure that can get the question to the United States Supreme Court for review and determination. That this is a legal wrong without a judicial remedy makes it no less a legal wrong."

It goes on to express the view that the maintenance of international peace and security in Southeast Asia is "vital" to the national interests of the United States and declares the readiness of the United States to take all necessary steps, including the use of armed forces, to assist any member or protocol SEATO state to defend its freedom. The Resolution, however, provides that all such steps shall be

> Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty. . .

There is a firm line of decisions that subsequent acts of Congress must be construed as to be consistent with the obligations of pre-existing treaties wherever such construction "is possible". (*U.S. v. Payne*, (1924) 264 U.S. 446, 449; *Cook v. U.S.*, (1933) 288 U.S. 102, 120; *Pigeon River Improvement Co. v. Cox*, (1934) 291 U.S. 138, 160; *Whitney v. Robertson*, (1888) 124 U.S. 190, 194). Repudiation or nullification of a prior treaty can only be inferred when "absolutely incompatible". (*Johnson v. Browne*, (1907) 205 U.S. 309, 321); this, because it must be presumed that the United States at all times intends to abide by all of its treaty obligations "with good faith and fairness." (*U.S. v. Payne, supra*, 264 U.S. 446, 448.)

See also: *Chew Hong v. U.S.*, (1884) 112 U.S. 536.
U.S. v. Gue Liw, (1900) 176 U.S. 459, 465.

The Tonkin Bay Resolution by its very terms states that it must be "consonant with . . . the Charter of the United Nations."

Our constitutional system is wisely one of checks and balances. The doctrine of "separation of powers" is fundamental to, and is one of the "great structural principles of the American constitutional system." Corwin, *The President: Office and Powers*, page 9.

This Court said in *Ex parte Milligan*, 4 Wall, 2, 139:

> The power to make the necessary law is in Congress; the power to execute in the President. Both powers imply many subordinate powers. Each includes all authority essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President.

"Nothing in our Constitution is plainer than that declaration of war is entrusted only to Congress." *Youngstown Sheet and Tube Company v. Sawyer,* 343 U.S. 579, 642.

The decision to place the responsibility for declaring war exclusively in Congress was deliberate by the Framers. The history of nations in which this power was vested in the sovereign was not to be repeated in this new government. This power to declare war was of such concern that it was not left to the Senate alone. The Framers therefore provided that the House of Representatives, larger and more representative of the people, should also decide the question.

> The Constitution says, therefore, in effect, "Our country shall not be committed formally to a trial of force with another nation, our people generally summoned to the effect that all the legal consequences to people, rights and property incurred until the House, Senate and the President agree." Rogers, *World Policing and the Constitution,* (Boston, 1945). page 35.

The power of the President is not an unlimited one and in the area of war it is governed by law clearly enunciated in the Constitution and defined by this Court. Mr. Justice Jackson in a concurring opinion in *Youngstown Sheet and Tube Company v. Sawyer, supra,* 655 (1952) recorded what the Framers of our Constitution intended:

> With all its defects, delays, and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the Law, and that the Law be made by parliamentary deliberations.

Mr. Justice Stewart in his opinion on the petition herein for a writ of certiorari points up an important question for this Court to decide. Was the Tonkin Bay Resolution an "impermissible delegation of all or part of Congress' power to declare war"?

The events following the passage of the Tonkin Bay Resolution caused Congress to reconsider what it had done. Had Congress abdicated its sole constitutional power to declare war? Had the President, as Chief Executive, assumed by this Resolution a right exclusively within the domain of the Legislature? Had the United States violated international law making its war conduct in Vietnam illegal? These very important questions of law began to trouble not only the Legislature, but many contemporary authorities on international law.[14]

In the United States Senate, hearings were held before the Committee on Foreign Relations, Senator J. W. Fulbright, Chairman. In the opening statement on August 16, 1967, he said (page 1):[14a]

> I am deeply concerned, however, with the constitutional question to be considered in these hearings. The fact that the war in Vietnam is related to the constitutional problem does not mean that the latter is merely a facade for pressing opposition to the war. It means only that this war, which I oppose so deeply, and events connected with it, such as the adoption of the Gulf of Tonkin resolution in 1964 and other events such as the Dominican intervention of 1965, have aroused in me an awareness of institutional problems that I probably should have had before, but in fact did not.

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[14] *Vietnam and International Law*, An Analysis of the Legality of the United States Military Involvement. Compiled by the Consultative Council of the Lawyers Committee on American Policy Towards Vietnam. Chairman, Richard A. Falk, Albert G. Milbank, Professor of International Law and Practice, Princeton University (O'Hare, 1967).

[14a] Hearings, Res. 151, Com. on For. Rel. U.S. Senate, 90th Cong. 1st Sess.

> (p. 2) I have another predilection which I wish to make clear at the outset. I believe that a marked constitutional imbalance between the Executive and the Congress in matters of foreign policy has developed in the last 25 years as a result of which the Executive has acquired unrestricted power to commit the United States abroad politically and militarily.

A witness before the Committee was Prof. Ruhl J. Bartlett, Professor of Diplomatic History, Fletcher School of Law and Diplomacy at Tufts University. It was his considered opinion that there is "no constitutional basis for the assumption that substantive powers were conferred on the President as the Executive" and thus the President has no "authority as commander-in-chief to replace the authority of the Congress to declare war or to determine the use of the armed forces, or that he has the authority to define and execute treaties in any way he desires." (page 21)

In commenting upon the President's reliance upon SEATO as justification for sending troops to Vietnam, Professor Bartlett was very critical (page 39):

> The Secretary of State has said that the United States is acting under the authority of the SEATO treaty in Vietnam, but the SEATO treaty under any sharp interpretation does not confer upon the President the power to use the U.S. Army to implement the treaty. This is an exaggeration of the interpretation of the treaty.

4.

Treaties by reason of Article VI, Clause 2, are the supreme law of the land. They have long been held by this Court to be equal to legislative acts. *Foster v. Neilson*, 27 U.S. 253 (1829).

Treaties between nations relating to the law of war have a force equal to that of laws enacted by the Congress. "Their provisions must be observed by both military and civilian personnel with the same strict regard for both the letter

and spirit of the law which is required with respect to the Constitution and statutes enacted in pursuance thereof." (Law of Land Warfare, Department of the Army Field Manual, 27-10, July, 1956, p. 7).

A member of the armed forces who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment,[15] (ibid., p. 178); nor can he raise as a defense that he acted pursuant to "superior authority." (ibid., p. 182).

Hugo Grotius (1583-1645) wrote a book in 1645 entitled *On War and Peace*. Many ideas in this book acquired a renewed significance at Nuremberg, such as the proposition that individuals are directly obligated by international law.

5.

Mr. Justice William O. Douglas in his decision to grant the petition herein for a writ of certiorari noted with criticism the detachment of sentences from an opinion of the Court that would give the impression "that what is happening is none of our business." Reference was made to respondents' memorandum in opposition to the petition wherein this sentence from *Johnson v. Eisentrager*, 339 U.S. 763, 789 was quoted:

> Certainly it is not the function of the Judiciary to entertain private litigation – even by a citizen– which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.
> * * *

---

[15] "But international law, like national law, must be directly applicable to the individual. It must not continue to be remote from him, as in the traditional law, which is considered to be applicable to states alone and not to individuals". Jessup, *A Modern Law of Nations* 2 (1952).

In this case Germans captured in China were to be tried before a Military Commission. They sought a writ of habeas corpus in the District Court for the District of Columbia. The lower court denied the writ and the Court of Appeals reversed hodling that "(b) In the absence of hostilities, martial law, or American Military occupation of China, and in view of treaties between the United States and China . . . . and between Germany and China . . . the Military Commission was without jurisdiction." This Court reversed the Court of Appeals denying the writ, stating at page 775 that Courts can "ascertain the existence of a state of war."

In *Johnson v. Eisentrager, supra*, the Court was deciding a case upon facts totally different from this case and especially one involving a state of "declared war".

6.

The case now before this Court does not lie beyond judicial cognizance. This point is presented in full in the petition for certiorari and will not be repeated in this petition for a rehearing. The authorities therein cited are:

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579.
Baker v. Carr, 369 U.S. 186
Nixon v. Herndon, 273 U.S. 536
Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (citing *United States v. Lee*, 106 U.S. 196)

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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Dated: November 27th, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

MORA ET AL. *v.* McNAMARA, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 401. Decided November 6, 1967.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The petitioners were drafted into the United States Army in late 1965, and six months later were ordered to a West Coast replacement station for shipment to Vietnam. They brought this suit to prevent the Secretary of Defense and the Secretary of the Army from carrying out those orders, and requested a declaratory judgment that the present United States military activity in Vietnam is "illegal." The District Court dismissed the suit,[1] and the Court of Appeals affirmed.[2]

There exist in this case questions of great magnitude. Some are akin to those referred to by MR. JUSTICE DOUGLAS in *Mitchell* v. *United States*, 386 U. S. 972. But there are others:

I. Is the present United States military activity in Vietnam a "war" within the meaning of Article I, Section 8, Clause 11 of the Constitution?

II. If so, may the Executive constitutionally order the petitioners to participate in that military activity, when no war has been declared by the Congress?

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[1] — F. Supp. — (D. D. C. 1966).

[2] — U. S. App. D. C. —, — F. 2d —.

III. Of what relevance to Question II are the present treaty obligations of the United States?

IV. Of what relevance to Question II is the joint Congressional ("Tonkin Bay") Resolution of August 10, 1964?

(a) Do present United States military operations fall within the terms of the Joint Resolution?

(b) If the Joint Resolution purports to give the Chief Executive authority to commit United States forces to armed conflict limited in scope only by his own absolute discretion, is the Resolution a constitutionally impermissible delegation of all or part of Congress' power to declare war?

These are large and deeply troubling questions. Whether the Court would ultimately reach them depends, of course, upon the resolution of serious preliminary issues of justiciability. We cannot make these problems go away simply by refusing to hear the case of three obscure Army privates. I intimate not even tentative views upon any of these matters, but I think the Court should squarely face them by granting certiorari and setting this case for oral argument.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967,

MORA ET AL. *v.* McNAMARA, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 401. Decided November 6, 1967.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART concurs, dissenting.

The questions posed by MR. JUSTICE STEWART cover the wide range of problems which the Senate Committee on Foreign Relations recently explored,[1] in connection with the SEATO Treaty of February 19, 1955,[2] and the Tonkin Gulf Resolution.[3]

Mr. Katzenbach, representing the Administration, testified that he did not regard the Tonkin Gulf Resolution to be "a declaration of war" [4] and that while the Resolution was not "constitutionally necessary," it was "politically, from an international viewpoint and from a domestic viewpoint, extremely important." [5] He added:[6]

> "The use of the phrase 'to declare war' as it was used in the Constitution of the United States had a particular meaning in terms of the events and the practices which existed at the time it was adopted . . . .
>
> "[I]t was recognized by the Founding Fathers that the President might have to take emergency action to protect the security of the United States,

[1] Hearings on S. Res. No. 151, 90th Cong., 1st Sess. (1967).
[2] [1955] 6 U. S. T. 81, T. I. A. S. No. 3170.
[3] 78 Stat. 384.
[4] Hearings, on S. Res. No. 151, *supra*, n. 1, at 145.
[5] *Id.*, at 145.
[6] *Id.*, at 80–81.

but that if there was going to be another use of the armed forces of the United States, that was a decision which Congress should check the Executive on, which Congress should support. It was for that reason that the phrase was inserted in the Constitution.

"Now, over a long period of time, . . . there have been many uses of the military forces of the United States for a variety of purposes without a congressional declaration of war. But it would be fair to say that most of these were relatively minor uses of force . . . .

"A declaration of war would not, I think, correctly reflect the very limited objectives of the United States with respect to Vietnam. It would not correctly reflect our efforts there, what we are trying to do, the reasons why we are there, to use an outmoded phraseology, to declare war."

The view that Congress was intended to play a more active role in the initiation and conduct of war than the above statements might suggest has been espoused by Senator Fulbright (Cong. Rec. Oct. 11, 1967, p. 14683–14690), quoting Thomas Jefferson who said:[7]

> "We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."

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[7] 15 Papers of Jefferson 397 (Boyd ed., Princeton 1955). In the Federalist No. 69, at 465 (Cooke ed. 1961), Hamilton stated:

"The President is to be Commander in Chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy; while that of the British King extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies; all which by the Constitution under consideration would appertain to the Legislature."

These opposed views are reflected in the *Prize Cases*, 2 Black 635, a five-to-four decision rendered in 1863. Mr. Justice Grier, writing for the majority, emphasized the arguments for strong presidential powers. Justice Nelson, writing for the minority of four, read the Constitution more strictly, emphasizing that what is war in actuality may not constitute war in the constitutional sense. During all subsequent periods in our history—through the Spanish-American War, the Boxer Rebellion, two World Wars, Korea, and now Vietnam—the two points of view urged in the *Prize Cases* have continued to be voiced.

A host of problems is raised. Does the President's authority to repel invasions and quiet insurrections, his powers in foreign relations and his duty to execute faithfully the laws of the United States, including its treaties, justify what has been threatened of petitioners? What is the relevancy of the Gulf of Tonkin Resolution and the yearly appropriations in support of the Vietnam effort?

The London Treaty (59 Stat. 1546), the SEATO Treaty (6 U. S. T. 81, 1955), the Kellogg-Briand Pact (46 Stat. 2343), and Article 39 of Chapter VII of the UN Charter deal with various aspects of wars of "aggression."

Do any of them embrace hostilities in Vietnam, or give rights to individuals affected to complain, or in other respects give rise to justiciable controversies?

There are other treaties or declarations that could be cited. Perhaps all of them are wide of the mark. There are sentences in our opinions which, detached from their context, indicate that what is happening is none of our business:

> "Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the

propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region." *Johnson* v. *Eisentrager*, 339 U. S. 763, 789.

We do not, of course, sit as a committee of oversight or supervision. What resolutions the President asks and what the Congress provides are not our concern. With respect to the Federal Government, we sit only to decide actual cases or controversies within judicial cognizance that arise as a result of what the Congress or the President or a judge does or attempts to do to a person or his property.

In *Ex parte Milligan*, 4 Wall. 1, the Court relieved a person of the death penalty imposed by a military tribunal, holding that only a civilian court had power to try him for the offense charged. Speaking of the purpose of the Founders in providing constitutional guarantees, the Court said:

> "They knew . . . the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which *time* had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of *habeas corpus*." *Id.*, 125.

The fact that the political branches are responsible for the threat to petitioners' liberty is not decisive. As Mr. Justice Holmes said in *Nixon* v. *Herndon*, 273 U. S. 536, 540:

> "The objection that the subject matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but

it alleges and seeks to recover for private damage. That private damage may be caused by such political action, and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby* v. *White*, 2 Ld. Raym. 938, 3 *id.* 320, and has been recognized by this Court."

These petitioners should be told whether their case is beyond judicial cognizance. If it is not, we should then reach the merits of their claims, on which I intimate no views whatsoever.